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# Creative Businesses Should be Run Like Businesses

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# Creative Businesses Should be Run Like Businesses

Posted on **September 1, 2003** by **Editor**



**By Leonard D. DuBoff**

One of the problems many creative people have is that they tend to focus solely on creative output, paying little attention to business practices, such as copyright registration and proper documentation. It is well settled that the Copyright Revision Act of 1976, as amended, does not require copyright owners to register the copyright in their works as a prerequisite to the creation and existence of a valid copyright in a copyrightable work. It is also well settled that creative works are protectable under the copyright statute as original works of authorship. As a result, many people are of the opinion that it is neither necessary nor important to register the copyright in their work.

However, while the copyright statute does provide for the creation of a valid copyright in copyrightable work merely by putting those works into tangible form, it also provides incentives for registering the copyright in those works. Indeed, unregistered copyrights are like watchdogs without teeth or the ability to bark. Registration has become even more important with the advent of the World Wide Web since many designs and creations are online with stock agencies and unauthorized downloads are occurring on an ever-increasing basis.

The importance of registration becomes evident when it is necessary to enforce a copyright. First, the law requires copyright owners to register a copyright before a lawsuit may be filed. Second, the statute provides the owner of an infringed copyright with a number of remedies and the remedies available for infringement of a timely registered work are superior to those available for infringement of a work registered after the date of infringement.

Remedies available for any copyright infringement include the right to recover the actual damages resulting from the infringement, as well as any additional profits of the infringer, that is, the amount the copyright owner can prove was lost as a result of the infringement plus the amount the infringer earned in connection with the infringement, to the extent such amount is not included in the actual damages calculation.

Courts have required copyright owners to prove their losses with some particularity. Unfortunately, this is an extremely difficult task and rarely occurs. In fact, one of the few cases to allow the aggrieved copyright owner to recover the amount lost is *Harper & Row Publishers, Inc. v. Nation Enterprises, Inc.* In this case, former President Gerald Ford was able to show that he had a contract with *Time* magazine for the first serialization of his presidential memoirs. When *The Nation* magazine published an unauthorized serialization of that book first, *Time* cancelled its contract with the former President. As a result of the cancelled contract, Ford was able to recover the amount he lost. This is the kind of particularity required by courts.

Although the infringer's profits can be identified during the discovery process of the litigation, such profits are often modest and rarely exceed the attorneys' fees incurred in establishing them. Unfortunately, these damages are all that are available unless the copyright in the work was registered before the infringement occurred.

In other words, a creative person who wishes to enforce rights must register the copyright in the work, but registering a copyright after the date of an infringement will not entitle the copyright owner to recover statutory damages and attorneys' fees.

Statutory damages, which are awarded in lieu of actual damages, do not require proof of loss or of the infringer's profits. They are no less than \$750 and no more than \$30,000, and if it can be established that the infringement was willful, up to \$150,000 per infringement. In addition, the copyright owner may also recover its reasonable attorneys' fees incurred in the litigation.

Copyright litigation is tried in the federal court system (not at the state or local level). The cost of this type of litigation is often much greater than the amount of actual damages available. It is, therefore, rarely cost effective to litigate copyright cases unless the work involved was registered before the infringing act occurred.

In the case of *Gonzales v. Transfer Technologies, Inc.*, the United States Court of Appeals for the Seventh Circuit was faced with a situation in which the copyright owner had created a number of copyrightable T-shirt designs. These designs were properly and promptly registered and subsequently infringed. The trial court felt that the artistic quality of the work was not very impressive and awarded the plaintiff the minimum statutory damages. When the case was appealed to the United State Court of Appeals for the Seventh Circuit, however, it held that the copyright owner should have been awarded the attorneys' fees incurred in litigating the case since the statute should provide some form of deterrence against copyright infringement. It is clear from the appeal court's opinion that diligent copyright owners who register their work should be entitled to recover, at the very least, the amount they are forced to incur litigating against infringers. This case underscores the importance of promptly registering a copyright in copyrightable works, but there are also some interesting collateral issues.

The United State Supreme Court has held that in copyright litigation where the work involved was preregistered and where it could be established that the litigation was meritless, the parties

successfully defending the case may be entitled to recover attorneys' fees as well. In addition, Rule 11 of the Federal Rules of Civil Procedure provides that those who file meritless lawsuits may be subjected to sanctions under the statute. It is clear, therefore, that copyright owners should carefully evaluate the merits of their cases before they are filed, as prosecuting a frivolous lawsuit can subject a party to Rule 11 sanctions. It is for this reason that it is important to work with experienced, competent, and skilled copyright attorneys.

When determining the amount of attorneys' fees to be awarded (when available) in litigation, courts use well established criteria. The criteria include a comparison of the plaintiff's attorneys' rates and skills to those of other attorneys, as well as consideration of such aspects as their experience and reputation, and the time and effort actually applied to the matter; the payment arrangement between the client and attorney; any controversial or publicized portions of the case; the uniqueness of the case; and whether or not the defendant can pay what the court awards.

The statute does provide other remedies in infringement suits as well. The successful litigant, whether or not the works were preregistered, may be entitled to have all infringing works, as well as any molds, plates or the like, destroyed in order to prevent future infringements. A skilled attorney may be able to use the threat of remedies such as the destruction of infringing work as a means of persuading a wrongdoer to provide an attractive settlement to copyright owners before a case goes to court. In one case where the amount recovered for the infringement was low, the defendant was willing to pay extra post-litigation royalties as additional compensation to the successful copyright-owner litigant in order to prevent the infringing copies of the book from being destroyed.

Another benefit in promptly registering copyrightable works is the fact that a copyright is presumed valid if the registration occurs within five years of the date the work was first published. This presumption of validity assists copyright owners in litigation by eliminating the necessity of proving the validity of the copyright. Indeed, if a wrongdoer feels that the copyright is invalid, then it is incumbent on the wrongdoer to overcome the statutory presumption of validity. This makes the defense case more difficult, and, unless there is some obvious reason for the copyright being declared invalid, it will rarely occur.

The statute provides copyright owners with a "safe harbor" for preregistration by stating that if the copyright is registered within three months of the date the work was first published, then the copyright registration will be deemed to have been made as of the date of first publication. When a copyright registration is made after the three-month window has elapsed, then the copyright will be deemed registered as of the date a properly completed application, along with the appropriate deposit and fee, are received in the Copyright Office.

As of this writing, the U.S. Copyright Office reports that it is approximately six months behind in registrations. It is possible to expedite the registration process if registration is necessary for litigation, but there is a fairly steep charge for this service: The cost of regular copyright

registration is \$30, whereas the cost of an expedited registration is \$580 plus the \$30 filing fee. Expedited registrations are usually made within five days of the date they are received by the Copyright Office; however, the Copyright Office does not guarantee registration within five days – particularly if additional information is needed to process the registration.

A creative person can register groups of work in some situations. A single registration for a number of designs, for example, can be used so long as (1) the works in question have not yet been published or (2) the designs were all published for the first time together. For unpublished works, all of the works must be put together in an orderly manner with a title identifying the whole collection. There are special rules for registration of published works as a group.

The process of registering a copyright is quite simple. The Copyright Office website at [www.copyright.gov](http://www.copyright.gov) contains the appropriate forms for registration. In the case of most creative works, Form VA is used. Care should be taken in filling out these forms, since errors in filling them out can present problems when a copyright is involved in litigation. My office frequently works with creative people in preparing their first application and teaching them how to register their works in the future.

In addition to registering the copyright in their works, creative people should establish good business practices, including having proper documentation of their work when it is sent to clients. Documentation was, in fact, essential in a case involving a photographer recovering for his lost images in a recent Oregon case.

Mark Gamba, now of Portland, Oregon, is a well respected, highly acclaimed photographer whose work is used in advertising spreads throughout the world. Due to Mr. Gamba's popularity, Columbia Sportswear, an Oregon garment corporation, desired to use his work as part of the clothing company's advertising program. Fourteen hundred transparencies were shot by Mr. Gamba for this purpose and shipped to Columbia's Portland offices, along with the appropriate documentation identifying the images. The documentation for the images provided, among other things, that if any of the images were lost, the recipient would be responsible for paying \$1,500 per lost item, that any dispute would be arbitrated in Bend, Oregon, and that the prevailing party in any such arbitration would be entitled to recover the attorneys' fees incurred in the dispute.

Sometime later, Mr. Gamba was advised that representatives of Columbia Sportswear could not find 38 of his transparencies. Despite the fact that it was clear that all of the works were actually received by the sportswear company, the company failed to make payment for the missing transparencies, and the photographer was forced to send a demand letter threatening litigation.

Thanks to the proper documentation, the case was ultimately resolved in favor of Mr. Gamba, who obtained a judgment for more than \$74,000. The sportswear company, through its insurance carrier, was forced to pay that judgment and the legal fees incurred by its own insurance defense lawyer as well.

By working with skilled, knowledgeable, and experienced attorneys, taking the precaution to promptly register the copyright in one's works, and having appropriate documentation, creative people will be in a position to protect their rights when problems arise. Creative people should be aware of laws governing the rights involved in their profession and take the steps necessary to protect their rights for the future.

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